poles and conduits necessary for the construction of independent cable systems, telephone companies owning a cable system would have an incentive to deny access to such poles and conduits by independent cable operators.[55] Subsequently, Congress adopted legislation providing cable operators and other communications providers with a right of access to telephone poles and conduits owned and controlled by the LECs.[56] By banning telco/cable cross-ownership in spite of these pole attachment provisions, Section 533(b) of the 1984 Cable Act prohibited more speech than necessary because the pole attachment rules guaranteed speakers a means of disseminating their messages. Similarly, one of the fears driving the cable/television station cross-ownership ban in 1970 was the fear that a co-owned local cable system and broadcast station would have incentives to favor the co-owned station to the detriment of the other local broadcasters.[57] But today, existing laws provide for more narrowly tailored regulatory safeguards, rendering the cross-ownership ban overbroad and unnecessary. For example, the aforementioned must-carry, leased access and program carriage rules, as well as cable operators' PEG obligations, already provide much more

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[55] Applications of Telephone Companies for Section 214 Certificates For Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 FCC 2d 307, paras. 46-49 (1970), aff'd sub nom General Telephone of the Southwest v. U.S., 449 F.2d 846 (5th Cir. 1971).

[56] 47 U.S.C. § 224 (1996), as amended.

[57] 1970 Cable Order at para. 12 ("[W]here there is more than one local television station, it does not appear desirable ... to permit one [station] to gain a competitive advantage over others excluded from such a TV-CATV combination.")

focused mechanisms for guarding against any of the imaginary abuses underlying the adoption of the ban in 1970.[58]

Although the cable/television station cross-ownership ban has escaped judicial analysis, the Commission's efforts to advance diversity in the broadcast ownership context have not fared well at the hands of the D.C. Court of Appeals, suggesting a similar fate for the ban in the event is does face judicial challenge. The court has exhibited a skepticism toward the constitutionality of governmental measures designed to advance diversity in the broadcast ownership context and has demanded that the Commission prove how restrictions further that goal. For example, in Bechtel v. FCC,[59] the court required the Commission to show why its preference in broadcasting licensing for integration of ownership and management, which the Commission adopted in 1965, was still in the public interest.[60] The court reasoned that factual and legal changes may impose on the FCC the obligation to reconsider settled policy or explain why it did not do so.[61] Bechtel pointedly demonstrates that even absent a specific congressional mandate that it reconsider and provide empirical support for its rules, the

[58]Given the plethora of video programming providers in existence today, not to mention the myriad other information sources, Time Warner disputes the very premise that commonly owned co-located cable and television stations could ever come close to creating a problem regarding concentration of speech outlets in a particular community. Time Warner assumes that this fear is a legitimate one merely for the sake of argument, to illustrate the ban's constitutional deficiencies.

[59]957 F.2d 873 (D.C. Cir. 1992).

[60]Id. at 879.

[61]Id. at 881.

Commission must produce evidence that a decades-old ownership restriction still serves the public interest in the face of significant competitive and regulatory changes.[62]

More recently, the D.C. Circuit exhibited a similar skepticism toward the nexus between broadcast ownership and diversity by striking down the Commission's broadcast EEO rules in Lutheran Church--Missouri Synod v. FCC.[63] Applying strict constitutional scrutiny, the court criticized the implicit assumption in the Commission's EEO rules that a licensee with a more diverse employee pool would necessarily have more diverse programming, particularly when the job descriptions of the employees in question bore no relation to programming decisions.[64] According to the court, the Commission failed to show the necessary nexus between ownership and programming diversity to meet the First Amendment's narrow tailoring requirement.[65] The court's sharp rebuke to the Commission in Lutheran Church illustrates the constitutional perils of governmental attempts to regulate diversity in the broadcasting context, even if by arguably content neutral structural methods such as cross-ownership restrictions.

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[62]See also Geller v. FCC, 610 F.2d 973, 978 n.39, 980 (D.C.Cir. 1979) (the FCC has the "affirmative duty to ascertain whether [its] regulations still serve[] some aspect of the public interest.").

[63]1998 U.S. App. LEXIS 7387 (D.C. Cir. 1998).

[64]Id. at *39-40.

[65]Id. at *39 (Even if FCC's interest were compelling, the EEO regulations "are quite obviously not narrowly tailored.")

In at least one other instance of a governmental restriction on cable operators' speech through a ban on cross-ownership, the judicial analysis suggests that the cable/television station cross-ownership ban does not fit within the permissible constitutional parameters for regulation. In Melcher v. FCC,[66] the D.C. Circuit Court of Appeals upheld the Commission's ban on cable owners and LECs from obtaining licenses to distribute local multipoint distribution service (LMDS) -- a yet-to-be-implemented video delivery technology. However, as with NCCB, although the court upheld the cross-ownership restriction, the court's reasoning in Melcher in fact supports overturning the cable/broadcast cross-ownership ban because of the different factual and legal predicates from those at issue in the cable/broadcast arena. First, the Melcher court afforded the FCC substantially more deference in assessing the impact of cable/LMDS cross-ownership than is permissible under Section 202(h).[67] Second, LMDS, as a new service, does not have the equivalent of a must-carry provision safeguarding access for third parties to the combined cable/LMDS facilities, allowing broader restrictions than are permissible in the cable/broadcast context. Third, the FCC anticipates that the ban preventing cable operators from obtaining LMDS licenses, which is intended to protect the new service in its beginning stage of development, will last only

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[66]134 F.3d 1143 (D.C. Cir. 1998), 1998 U.S. App. LEXIS 1659 (Decided February 6, 1998).

[67]1998 U.S. App. LEXIS at *23 ("... our review of the FCC's exercise of its predictive judgment is particularly deferential," citing NCCB).

three years.[68] By contrast, the cable/television station cross-ownership ban, similarly intended in part to protect the then-incipient cable industry, has remained in existence for over twenty-five years, even as the circumstances giving rise to its adoption have undergone radical change.

III. CONCLUSION

Clear statutory directive, fundamental First Amendment principles and sound public policy all demand that the Commission review the cable/television station cross-ownership ban and either repeal it or produce empirical evidence proving a close nexus between the restriction and real, not merely conjectural, harms which would result from elimination of the restriction. In fact, the Commission's traditional objectives in regulating media ownership, promotion of diversity and competition, will be better served by allowing commercially beneficial partnerships between co-located cable systems and television stations. The marketplace, and not overbroad, constitutionally suspect restrictions on speech, provides the best mechanism to advance viewpoint diversity and competition. But if the Commission thinks otherwise, it must offer evidence to support its reasoning.

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[68] Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-20.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report and Order, CC Docket No. 92-297 (rel. March 13, 1997) at para. 160. After three years, the eligibility restrictions terminate unless the FCC determines that continuance of the restrictions will promote competition. Id.

The dramatic technological, competitive and regulatory changes in video distribution, unthinkable to the Commission that promulgated the rule, have fundamentally altered the assumptions of over twenty-five years ago. Where the Commission once could summarily ban common ownership of co-located television stations and cable systems with almost no explanation nor judicial challenge, Congress has now demanded that the Commission justify the ban or repeal it. Where cable's status as a First Amendment speaker was not readily apparent in 1970, it is now firmly established by judicial precedent, requiring any restrictions at least to satisfy intermediate scrutiny. Where the dearth of video delivery mechanisms once concentrated enormous power to influence public debate in a few broadcasters' hands, now that power has been diffused by the onslaught of new technologies and the development of new media. Where the risk of anti-competitive favoritism by cable operators may have once threatened the existence of the other local broadcasters, the Commission's must-carry rules and other regulatory safeguards have ensured nondiscrimination and provided alternative platforms for speakers. Where a nonspecific fear of concentration pervaded the legal landscape in 1970, today the prevailing approach is to assess the impact of any regulatory policy on consumers. Each of these developments provides a compelling rationale for overturning the ban. Taken together, they overwhelmingly point to the rule's repeal as the only sound outcome to this proceeding.

For the foregoing reasons, Time Warner respectfully requests that the Commission repeal the ban on cross-ownership of co-located cable systems and television stations.

Respectfully submitted,

TIME WARNER CABLE

By ____________________

Aaron I. Fleischman
Arthur H. Harding
Craig A. Gilley
Paul W. Jamieson

FLEISCHMAN AND WALSH, L.L.P.
1400 16th Street N.W., Suite 600
Washington, D.C. 20036
202/939-7900

Its Attorneys

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